STATEMENT OF
PROFESSOR JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON, D.C.

BEFORE
THE HOUSE COMMITTEE ON AGRICULTURE

"EMINENT DOMAIN AND THE SUPREME COURT'S PUBLIC USE DOCTRINE"

SEPTEMBER 7, 2005

Thank you, Mr. Chairman, it is an honor to appear before the Committee and its distinguished members.

I.
INTRODUCTION

Chairman Goodlatte, given the limited time of the Committee members today, I would like to submit a longer written statement to augment my oral testimony.

The recent decision in *Kelo v. City of New London*[1] has created a firestorm of controversy across the country. Indeed, as disappointing as the 5-4 decision was for many of us, the reaction of Americans is reassuring evidence that the public remains committed to principles of both private property and individual rights. After the decision, ninety percent of polled Americans condemned the taking of

---

[1] 125 S. Ct. 2655, 2005 U.S. LEXIS 5011 (2005).

private property for private development.[2] Indeed, in our fractured times of red and blue states, the Supreme Court appears to have done the impossible: unite the country in the common cause of opposing its decision. While I have previously called for an expansion of public use theories in the area of presidential papers,[3] I share in the dismay of many Americans at the Supreme Court's decision and its disregard of the original and natural meaning of the Takings Clause of the Fifth Amendment of the Constitution.

The *Kelo* decision represents more than the mere opportunistic use of eminent domain power by a small Connecticut town. It represents a critical self-defining moment for the country. The Supreme Court essentially ruled that these controversies are merely political disputes best left to the political process. In doing so, the Court abdicated any responsibility to protect citizens from the insidious work of factional interests. As I will address below, this is an issue that was first articulated at the founding of our Republic and tied to the very foundation of our system of laws.

---

2 *Hands Off Our Homes*, The Economist, August 20, 2005, at 1.

3 *See* Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 Cornell Law Review 651-732 (2003); *see also* Testimony of Jonathan Turley, United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "H.R. 4187: The Presidential Records Act Amendments of 2002," April 24, 2002.

II.
THE ROLE OF FACTIONS AND PRIVATE PROPERTY IN THE MADISONIAN SYSTEM

Law professors often speak for people like James Madison as if they are originalist mediums channeling the thoughts of the Framers. However, I truly believe that the Framers would have been horrified by the decision in *Kelo* and what it represents about our protection of private property against governmental intrusion. One of the most influential philosophers for the Framers was John Locke, particularly with respect to the primacy of private ownership.[4] Locke believed that "[t]he great and chief end . . . of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property."[5] It was the preservation and protection of private ownership that Locke identified as the central purpose of people emerging from the "state of nature" and forming collective governmental systems.[6] The views of Locke and other contemporary philosophers regarding private property were captured in the influential Virginia Constitution, which declared that "All men are created equally free and independent and have certain inherent and natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing

---

4 *See generally* Turley, *Presidential Records and Popular Government*, *supra* note 3.

5 John Locke, Second Treatise of Government 66 (1690) (C.B. Macpherson ed., 1980)

property."[7] William Blackstone articulated a similar principle of private ownership as an individual right against the state. Blackstone argued that "the law of the land . . . postpones even public necessity to the sacred and inviolable rights of private property."[8]

These views resonated particularly with the Framers who saw the British crown as usurping their private property interests. It is clear that the Framers tied property and liberty together as the core guarantees of the American Republic. Indeed, John Adams insisted that "[p]roperty must be secured or liberty cannot exist."[9] Likewise, Madison stressed the importance of protecting private ownership vis-à-vis the state:

> As a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power

---

6 *Id.*

7 VA. DEC. OF RIGHTS OF 1776, prov. 1.

8 William Blackstone, 1 Commentaries on the Laws of England 134-35 (1765) ("So great . . . is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community.").

9 6 The Works of John Adams 280 (Charles Francis Adams ed. 1850). Notably, the modern Supreme Court has reaffirmed this view. *Lynch v. household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.").

> prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.[10]

Guaranteeing that citizens are "safe in [their] possessions" was at the heart of a number of provisions of the Constitution, including but not limited to the guarantee of due process and the Takings Clause. Obviously, the latter is most at issue in this case.

One aspect of the Takings Clause that is often overlooked is its relation to the central purpose of the Madisonian system: resisting the dysfunctional aspects of factional interests.[11] Madison viewed the effects of factions as one of the chief causes for the failure of prior governments. Such insular and concentrated interests could "convulse the society."[12] Yet, the brilliance of Madison was that his vision of government was based on a deep understanding of human flaws as well as human virtues. Madison believed "the latent causes of faction are . . . sown in the

---

[10] James Madison, Property, National Gazette (Mar. 27, 1792), reprinted in 14 The Papers of James Madison 266 (Robert Rutland et al. eds., 1983)

[11] *See generally* Jonathan Turley, A Crisis of Faith: Tobacco and the Madisonian Democracy, 37 Harv. J. on Legis. 433 (2000) (discussing the role of factional interests in government). Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 Hastings L.J. 185 (1992).

[12] The Federalist No. 10 at 80 (James Madison) (Clinton Rossiter ed., 1961).

nature of man"[13] and that, when left to their own devices in a free society, people are inclined naturally to serve their own insular factional interests.

Madison defined factional interests in a way that should seem familiar with cases like *Kelo*:

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[14]

Particularly during his tenure in state politics, Madison saw how quickly such factional interests formed to use legislative power to secure financial benefits. However, Madison was the ultimate realist. He believed that "the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its adverse."[15] Thus, Madison sought "to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and

---

13 The Federalist No. 10, *supra*, at 79.

14 The Federalist No. 10, *supra*, at 78.

15 The Federalist No. 10, *supra*, at 80. Madison explained this delicate balancing in government: "liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *Id.* at 78.

the form of popular government, is then the great object to which our inquiries are directed."[16]

Various parts of the Constitution work to blunt the worst effects of factions by directing their interests to the center of the legislative process. Other parts prohibit the most dangerous forms of factional impulse. One such provision is the Takings Clause that protects the property of citizens from majoritarian abuses. In economic terms, such takings are a form of rent-seeking.[17] Rent seeking is generally defined as the use of the political or legislative process to secure privileges or monopolies from the government.[18] Left to their own devices, factional groups or individuals will use their power in the political process to "rent seek" and secure benefits that they would not secure in a competitive market. Rent-seeking produces the economic inefficiencies of this form of abuse; inefficiencies that add to the political cost of abusive takings.

The situation in New London is an example of rent-seeking gone amuck. New London yielded to the temptation to condemn the homes of their neighbors to secure benefits for the rest of the town. In some ways, this is the worst form of

---

16 *Id.* at 80.

17 Jonathan Macey has discussed such classic rent-seeking conduct in the eminent domain context of *Missouri Pacific Co. v. Nebraska*. Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 Vand. L. Rev. 373, 388 (1996).

18 Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 587 (1982).

factional impulse where neighbors set upon neighbors. It is precisely the type of conduct that the Takings Clause should prevent.

III.
INTERPRETING THE TAKINGS CLAUSE

A. The Takings Clause and the Meaning of Public Use.

The Fifth Amendment states in part that "nor shall private property be taken for public use, without just compensation."[19] Few words have been the subject of more academic and judicial debate as the words of the Takings Clause. Much of this debate has concerned an issue not particularly relevant to this controversy: whether takings involve not just physical but also regulatory takings. In the current context, two interpretive questions are most material. First, is the question of whether the intent behind this language was to prohibit some forms of takings or simply to require that, when such takings occur, there is compensation. Second, and more narrowly, is the meaning of the term "public use."

1. *The Purpose of the Takings Clause*

One interpretation of the Takings Clause is that it merely requires compensation in some circumstances and is not a prohibition on takings – leaving such matters to the political process so long as compensation and due process rights are protected. The Framers clearly did not and would not prohibit the taking

---

[19] U.S. Const. amend. V.

of property for public use. They understood that eminent domain was required for government to function. Thus, it could be argued, they prohibited only uncompensated takings.

However, the Framers also believed in the "inviolability of property"[20] and attempted to protect citizens from the tyranny of the majorities as well as factional interests. The Fifth Amendment only identifies a "public use" as a circumstance where property can be taken. *Cf. Marbury v. Madison*, 5 U.S. 137 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."). The drafters could hardly have meant that takings for private use do not require compensation. They seemed to presuppose that any takings had to first serve a public use and then guarantee compensation to be constitutional. The Supreme Court has long endorsed the view that the Takings Clause prohibits not just uncompensated takings, but takings that are not based on legitimate claims of

---

[20] Madison wrote:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

James Madison, Property, Nat'l Gazette, Mar. 27, 1792, in 14 The Papers of James Madison 267-68 (Robert A. Rutland et al., eds. 1983).

"public use." Thus, even in the highly deferential case of *Hawaii Housing Authority v. Midriff*,[21] the Court maintained that "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." While the scope of that judicial review has been radically narrowed with *Kelo*, the Court has accepted (as it must) that the intent of the Takings Clause is to bar non-public uses and not just uncompensated takings.

As a result of the Takings Clause, the Framers clearly assigned property the constitutional protections afforded other core rights. These protections were augmented by the common law protections found in nuisance and other doctrines. As historian Forrest McDonald has written, constitutional and common law "[t]ogether . . . placed life, liberty, and property morally beyond the caprice of kings, lords, or popular majorities."[22] If the Court does not invite such caprice with its *Kelo* decision, it certainly removes barriers to capricious condemnation of private property.

2. *The Meaning of Public Use.*

For most Americans, the term "public use" seems perfectly clear and confined. In the very least, it is a term that is clear as to what it is not: it is not private use. Historically, the use of eminent domain has been largely confined to

---

[21] 467 U.S. 229, 239 (1984)

obvious public uses such as highways, parks, military installations and the like. Indeed, until *Kelo*, most Americans were unaware that eminent domain has been used to take property from one citizen and give it to another. Many states already have laws barring such use of eminent domain and state supreme courts have often interpreted their constitutions as excluding such takings from public use definitions. Most recently, the Michigan Supreme Court overturned an earlier ruling in *Poletown Neighborhood Council v. City of Detriot*[23] that had allowed for a more expansive interpretation of public use that included reducing unemployment and expanding an economic base. In *County of Wayne v. Hathcock*,[24] the court held that public use does not include the condemnation of private land to build a technological park despite the considerable economic benefits to the community.

However, other courts have allowed the concept of public use to expand to encompass virtually any governmental claim of indirect benefits. This has included the following extensions of the public use concepts:

---

[22] Forrest McDonald, *E Pluribus Unum*: The Formation of the American Republic 1776-1790, 310 (1979).

[23] 410 Mich. 616, 304 N.W.2d 455 (1981).

[24] 471 Mich. 445, 684 N.W.2d 765 (2004).

-- condemning the property of six different private owners in extremely valuable lots in Manhattan to allow the New York Times to expand and construct a more valuable array of condos and galleries.[25]

--condemning private property next to Donald Trump's casino so that he could have a waiting station for limousines.[26]

-- condemning a lease of a company in a shopping center in Syracuse to allow the owner to redevelop the property free of its obligations under the leasehold.[27]

--condemning property in Kansas for the sole purpose of attracting a new and more promising business to the area.[28]

-- condemning private property from one business to give to another to develop an area in Minneapolis despite the interest of the original owner to develop the property in a similar fashion.[29]

---

[25] *In re West Street Realty LCC v. New York State Urban Development Corp.*, 298 A.D.2d 1, 744 N.Y.S.2d 121 (2002).

[26] In this case, Trump had offered the property owner, Vera Coking, four times the price that the Casino Reinvestment Development Authority ultimately forced her to accept under eminent domain. John Curran, *State May Run Woman Out of Home to Benefit Casino*, Record, Jan. 12, 1997, at A6.

[27] *J.C. Penney Corp. v. Carousel Center Co.*, 306 F. Supp.2d 274 (N.D.N.Y. 2004).

[28] *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners of Shawnee County*, 275 Kan. 525, 66 P.3d 873 (2003).

[29] *Minneapolis Community Development Agency v. OPUS Northwest*,582 N.W.2d 596 (Minn. 1998).

--condemning a Walgreens in Cincinnati to build a Nordstrom department store, then condemning a CVS pharmacy to relocate the Walgreens, then condemning other businesses to relocate the CVS.[30]

--condemning a parking lot in Shreveport to give it to another business for use as a parking lot.[31]

These are but a few examples of powerful economic and political interests using eminent domain to favor one business interest over another. Such cases should not simply reaffirm the need for a more narrow and natural definition of public use, but demonstrate the more fundamental costs of allowing a more permissive definition. When we debate the meaning of public use, we do so in the context of a broader understanding of the public good. If the benefits of the public use of a highway are relevant to taking property, so must be the costs of such use on the countervailing public good embodied by private rights of ownership. This point was once driven home by Blackstone who noted that "[t]he public good is nothing more essentially interested, than the protection of every individual's private rights."[32] The home is perhaps the most protected place in the American Constitution. Yet, while we heavily restrict the ability to search or to enter a home

---

30 *See* Dana Berliner, Institute of Justice, Public Power, Private Gain: A Five-Year, State by State Report Examining the Abuse of Eminent Domain 160-61 (2003).

31 *City of Shreveport v. Shreve Town Corp.*, 314 F.3d 229 (5th Cir. 2002).

under the Fourth Amendment, the Court has now made it relatively easy to condemn and bulldoze the entire home under the Fifth Amendment. It is for this reason that eminent domain should be considered not a matter of property rights alone but individual rights. As noted below, the language of the Takings Clause has not changed but the courts have gradually changed their view of the clause and its singular importance to the rights of property owners.

III.
THE TAKINGS CLAUSE AND THE EVOLUTION OF THE MEANING OF PUBLIC USE.

A. The Road to Kelo: From Public Use to Public Purpose

The early Supreme Court justices often spoke in a strikingly Lockean voice about the protection of private property. For example, soon after the Constitution was ratified, Supreme Court Justice William Paterson wrote:

> It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.[33]

---

[32] William Blackstone, Commentaries on the Laws of England 139 (1783 ed.)

[33] *Van Horne's Lessee v. Dorrance,* 2 U.S. (2 Dall.) 304, 310 (1795).

Three years later, the Court again reaffirmed the natural and narrow reading of public use in *Calder v. Bull*,[34] when it observed:

> An ACT of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . A few instances will suffice to explain what I mean . . . [A] law that takes property from A and give it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Thus, the meaning of eminent domain began with the same common sense meaning that most Americans ascribe it today. Indeed, judges tied the narrow meaning of the public use criteria to the very liberties that defined the nation. In *Wilkinson v. Leland*, Justice Story noted that "government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."[35]

In *Missouri Pacific Railway Co. v. Nebraska*,[36] the Court imposed the narrow definition of public use to protect such private property rights. Various

---

34 3 U.S. 386, 3 Dallas 386 (1798).
35 *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).
36 164 U.S. 403 (1896).

powerful grain interests in Nebraska sought to secure land from the Missouri Pacific after the latter refused to sell. The Court rejected such use of eminent domain as "in essence and effect, a taking of private property . . . for private use."[37] Likewise, in 1848, justices denounced the concept of taking property to give to other private owners as "too broad, too open to abuse."[38]

The Court began in the early 1900s to loosen its definition of public use with greater and greater deference accorded government views of what served the public good in the use of eminent domain.[39] In 1916, the Court moved away from the classic definition of public use in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*.[40] Then, in 1923, the Court held in *Rindge Co. v. Los Angeles* that "it is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order

---

37 *Id.* at 417.

38 *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 545 (1848) (Woodbury, J., concurring); *see also id.* (stating that it would be manifestly improper to "tak[e] the property from A to convey to B.") (McLean, J., concurring).

39 Notably, even as the Court began to adopt a more deferential rule, it distinguished the type of taking in *Kelo*. *United States v. Gettysburg Electric Railroad Co.,*160 U.S. 688, 680 (1896) ("It is quite a different view which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself.").

40 240 U.S. 30, 32 (1916).

to constitute a public use."[41] By 1925, the Court took the view that the government's "decision is entitled to deference until it is shown to involve an impossibility."[42]

However, this gradual abandonment of a bright-line rule for the use of eminent domain power was accelerated with the Court's decisions in *Berman v. Parker*[43] and *Hawaii Housing Authority v. Midriff*.[44] In *Berman*, the Court upheld the condemnation of land in Washington, D.C. for redevelopment. The Court upheld the condemnation despite the fact that it was effectively the transfer of private property from one private citizen or company to another.[45] In *Midriff*, the Court upheld the condemnation of a large amount of private property to redistribute land from the concentrated ownership of a land oligopoly."[46]

These cases laid the foundation for *Kelo* with their sweeping language. In *Berman*, the Court noted that "the role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely

---

41 262 U.S. 700, 707 (1923); *but see Brown v. United States*, 263 U.S. 78, 83-84 (1923) ("neither the development of the private commerce of [a] city nor the incidental profit which might enure to [a] city out of such a procedure could constitute a public use authorizing condemnation.").

42 *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

43 348 U.S. 26 (1954).

44 467 U.S. 229 (1984).

45 348 U.S. at 33.

46 467 U.S. at 242.

narrow one."[47] That narrow role seemed perfectly nonexistent when coupled with the sweeping deference afforded to government officials:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[48]

Notably, the Court in these decisions did not abandon the pretence of barring takings for private interests. Indeed, *Midkiff* observed that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[49] Yet, the Court then defined public use so broadly as to defy any suggestion that a government condemnation is purely private. The result was an ever-expanding interpretation of public use as virtually any condemnation where the government could point to a cognizable benefit in the form of employment or tax revenues. Under the rubric of economic development, the Takings Clause was reduced to its

---

47 348 U.S. at 33.
48 *Id.*
49 467 U.S. at 245.

compensation component – compensation that is often far less than prior offers declined by the owners.

One of the reasons for the expansion of the meaning of public use is the adoption of a rational basis test by the Supreme Court. The Court interpreted eminent domain as virtually synonymous with traditional police powers,[50] the "least limitable" powers of government.[51] In so doing, it embraced the highly deferential rational basis test for determining when a public use claim was legitimate. The effect was to negate the very purpose of the clause. As my former law professor Thomas Merrill wrote two decades ago:

> This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between *noncompensable* regulation and compensable takings of property . . . Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation anytime its actions served a 'public use.' This approach would seemingly overrule the entire takings doctrine in a single stroke.[52]

The *Kelo* decision shows the natural result of the gradual loosening of the meaning of public use and the extreme deference given to the government's view of benefits to the public good.

---

[50] *Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). *see also Berman*, 348 U.S. at 31.

[51] *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

B. Kelo: A Question of Judicial Deference or Judicial Acquiescence.

The 5-4 decision in *Kelo* represents the final abandonment of public use as a meaningful restriction on the use of eminent domain. The majority in *Kelo* reaffirmed that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."[53] However, the key is the word "sole," the Court accepted such private redistributions if they had public purposes. The distinction is made meaningless by the holding. Since any condemnation like that in *Kelo* is ostensibly for economic development, the Court has created a test that is virtually impossible to fail since the Court will generally defer to the government on its judgment as to benefits.

The Court's decision effectively negates the meaning of the public use language in the text of the Takings Clause. This is particularly strange since, as Justice Thomas noted, the drafters referred to "general welfare" when they wanted to embrace a broader concept of public purpose.[54] By substituting public purpose for public use, the Court effectively reduces the clause to merely imposing a compensation requirement. Indeed, the Court notes that "the Takings Clause

---

[52] Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986).

[53] *Kelo*, 125 S.Ct. at 2661.

[54] *Id.* at 2679-80 (Thomas, J., dissenting).

largely 'operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge."[55]

The Court lessened its load by simply dismissing the possibility that it could return to a bright-line rule. It insisted that "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized."[56] Yet, this is precisely what state supreme courts have done. The alternative embraced by the Court is hardly acceptable: allowing any marginally plausible claim of public purpose to suffice. The broad deference relieves the Court of any meaningful role in reviewing eminent domain decisions: "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determination as to what lands it needs to acquire in order to effectuate the project."[57]

Despite the implications of its conversion of public use into public purpose, the Court dismisses these concerns as a "parade of horribles" and "hypothetical cases [that] can be confronted if and when they arise."[58] The Court further notes that many are fearful that powerful interests like Pfizer in New London will

---

55 *Id.* at 2667 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part).
56 *Id.* at 2665.
57 *Id.* at 2668.
58 *Id.* at 2667.

pressure transfers from other less powerful businesses or residents.[59] However, the Court insists that the condemnation in New London was commenced before Pfizer was a known beneficiary. Thus, according to the Court, "it is . . . difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown."[60] However, this misses the point. Rent-seeking behavior can begin with politicians in search of corporate partners. Politicians do not need to know which company will benefit from a condemnation if they know that the condemned property will bring a variety of likely partners or benefits. The point is not that the ultimate beneficiary was publicly identified but rather whether the targets were obvious. Condemnations follow the identification of pockets of vulnerable and low-valued businesses or residents for exploitation.

The Court's blind reliance on the political process ignores the dangers of factions that motivated many of the protections in the Constitution. The Takings Clause is invariably triggered by a majoritarian abuse. In these cases, it is the majority that acts to condemn the property of a small number of citizens. If the political process was a cure-all for such opportunistic behavior, no Takings Clause would be necessary beyond the guarantee of compensation. New London shows that the promise of jobs and lower taxes is enough to set neighbors upon neighbors.

---

59 *Id.* at 2662 n.6.

60 *Id.*

Even the torrent of criticism did not overcome the political support for the condemnation. Redistribution of property is often popular except among those who are the targets of the redistribution.

Kelo effectively leaves citizens bare and vulnerable to the dominant factional interests of localities. It harkens back to the lessons of Locke that liberty cannot exist where the exercise of power is "inconsistent, uncertain, unknown, [or] arbitrary."[61] "This freedom," Locke wrote, "from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together."[62]

It is a mistake to treat this as merely the loss of property because the loss is far more profound. Indeed, it brings a new modern meaning to the warning of Arthur Lee to the people of Great Britain as to their failure to protect private property: "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty."[63] Ironically, 230 years later, it appears that state and local governments are developing a taste for the very trappings of power that first led to our grievances with Great Britain.

---

61 Locke, Second Treatise, *supra* at 17.

62 *Id.*

63 James Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights 26 (1992) (quoting Arthur Lee, An Appeal to the Justice and Interests of Great Britain, in the Present Dispute with America 14 (4th Ed., New York 1775)).

IV.
REESTABLISHING THE PRIMACY OF PRIVATE PROPERTY THROUGH LEGISLATIVE ACTION

The *Kelo* decision obviously cries out for correction. It is important, however, to stress that a legislative correction will still leave the decision as a major precedent in narrowly defining the rights and legitimate expectations of citizens vis-à-vis their property. Until the decision is overturned or significantly curtailed, one of the most fundamental guarantees of the Constitution will be left as a privilege enjoyed at the pleasure of the government. Thus, while legislative responses can and should negate the effects of the decisions, the case itself will remain and undermine the expectations of citizens that the "inviolability"[64] of property rights remains a touchstone of our system.

In the aftermath of *Kelo*, states are considering changes in state laws and constitutions to create a state protection to replace the federal protection of private property. The most stringent state legislation requires actual public use or occupation for the use of eminent domain.[65] Other jurisdictions reject the notion of economic development as a public use.[66] Hopefully, states will move to close this gap in constitutional protections and blunt the effect of the ruling. However, it is

---

64 James Madison, Property, Nat'l Gazette, Mar. 27, 1792, in 14 The Papers of James Madison 267-68 (Robert A. Rutland et al., eds. 1983).

65 *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978).

unlikely that all states will move to offer such protection. The question becomes the possible role of Congress in responding to the ruling.

As an advocate of federalism, I am generally opposed to federal legislation that uses federal funds to dictate state conduct. However, while the states should play the dominant role in negating the effects of *Kelo*, the Congress clearly has some role in legislatively closing the hole judicially created by the Court. The most obvious role of Congress is to bar development funds to any project or program that engages in this form of abuse of eminent domain authority.

Congress is entitled to condition its support on the respect of private property rights. The Court has allowed Congress to condition federal funds on purposes that extend beyond the enumerated legislative areas in Article I.[67] A reasonable and tailored limitation should satisfy the conditions contained in *South Dakota v. Dole*.[68] First, such a condition would further the general welfare.[69] Absent such a condition, the federal government would be facilitating the practice of eminent domain abuse by co-financing projects. Such purposes are granted considerable deference by the Court[70] – a level equal to that afforded in *Kelo* to

---

66 *See, e.g., Merrill v. City of Manchester*, 499 A.2d 216, 218 (N.H. 1985); *Opinion of the Justices*, 131 A.2d 904, 908 (Me. 1957).

67 *United States v. Butler*, 297 U.S. 1, 65 (1936).

68 483 U.S. 203, 207 (1987).

69 *Id.*

70 *See, e.g., Helvering v. Davis*, 301 U.S. 619, 645 (1937).

eminent domain decisions. Indeed, the Court has noted that "the level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."[71] Second, the condition must be sufficiently clear that states can make a knowing and informed decision on whether to accept federal funds.[72] This second requirement demands clarity in drafting and effect. Third, the condition must be related to the specific articulated federal interest.[73] This nexus would be obvious in barring federal development funds to abuses of condemnation for economic development. Fourth, there must not be a constitutional bar to the conditional grant of federal funds[74] – which should not be a barrier in this case if the law is crafted with care. Finally, "the financial inducement offered by Congress [cannot] be so coercive as to pass the point at which 'pressure turns into compulsion.'"[75] It is hard to see how withholding federal funds on economic development is any more a form of compulsion than prior conditions on federal funds.

Obviously, much of the effort will depend on careful drafting to be successful. Of course, for many states, such a law would be easily satisfied by existing or proposed state laws barring such abuses. In those states without such

---

71 *Id.*
72 *Dole*, 483 U.S. at 207.
73 *Id.*
74 *Id.* at 209.

protections, they will have to certify that they have not engaged in this type of eminent domain abuse. This will require a clear definition of economic development, particularly in whether it includes or excludes the type of urban blight addressed in *Berman v. Parker*. The current definitions in the Strengthening the Ownership of Private Property Act (STOPP) of 2005 may need to be tweaked to clarify a variety of issues and the overall scope of the Act. In addition to the scope of the economic development definition, there is also the meaning of such terms as "private commercial development" or even "private individual or entity." With the downsizing of government, it is increasingly common to have former governmental functions carried out by private contractors or partners. It is important both for *Dole* and for the practical application of the STOPP Act that such ambiguities be eliminated in new drafts of the legislation. I would be happy to address such areas of concern with the Committee. Nevertheless, there is no reason why a federal statute cannot be crafted to pass muster under *Dole.*

V.
CONCLUSION

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement.[76]

---

[75] Id. at 211.

[76] William Pitt the Elder, Address before the House of Commons in 1766 (quoted in Nelson B. Lasson, The History and Development of the Fourth

--William Pitt the Elder

The principle articulated by William Pitt has long been cited in this country as one of the most noble and necessary guarantees of a free society. In light of *Kelo*, it seems like little more than a pretense today. However, the reason that this principle has so often been cited is that it defines not a government but its people. We remain a nation of intensely individualistic people. Homes like that of Ms. Kelo represent more than a simple structure with some ascertainable market value. They are extensions of their owners. Many citizens today feel lost in the global economy of outsourcing and downsizing. They feel threatened by international events that seem to worsen each year. While a citizen may feel increasingly at risk in this economy and in this dangerous world, there remains a place of their making that can afford a unique and personal space to exist and flourish. However, this space only exists when its expectations of ownership and privacy are guaranteed. *Kelo* robs citizens of the confidence that they alone control who enters this private space. It is a profound and indescribable loss. This decision now threatens the one place where a sense of control and sanity can be maintained for citizens. Citizens have a legitimate feeling of betrayal after the *Kelo* decision and they have a right to

---

Amendment of the United States Constitution 49-50 (1970)).

expect their legislators to act to protect their property rights. I commend this Committee in taking the lead in starting this process and I look forward to assisting the Committee and its members in crafting legislation that will both pass judicial review and remedy the judicial error of the *Kelo* decision.

Once again, I greatly appreciate the opportunity to submit my own views on the Supreme Court's public use doctrine and the role of legislature in reaffirming the primacy of private property.

I would be happy to answer any questions that the Committee may have on this testimony.